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In the Supreme Court of the United States

OCTOBER TERM, 1976

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, PETITIONER

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, ETC. ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of March 21, 1977, inviting the Solicitor General to express the views of the United States.

STATEMENT

The membership of the Fort Belknap Indian Community, comprising those portions of the Gros Ventre and Assiniboine Indian Tribes living on the Fort Belknap Reservation, is organized under a federally-approved 1935 constitution and is incorporated under a federally-issued 1937 charter. These instruments were approved and issued by the Secretary of the Interior pursuant to Sections 16 and

17, respectively, of the Indian Reorganization Act of 1934, 48 Stat. 987, 988, as amended, 25 U.S.C. 476, 477.[1]

James W. Gardipee in an affidavit filed in this Court on January 22, 1977, states that his wife and five children "are enrolled members of" petitioner, although he himself is "an enrolled member of the Turtle Mountain Indian Reservation, Aberdeen, North Dakota." On September 18, 1975, Gardipee commenced a common-law tort action (No. 7301) in the respondent state district court naming petitioner as the sole defendant. According to Gardipee's amended complaint (Pet. App. 3a-5a), Leon Martinez, petitioner's chief of police, "claims to have arrested" Gardipee in October 1974 for driving "on the Fort Belknap Indian Reservation without a valid Montana vehicle operator's license." The amended complaint further alleges that Police Chief Martinez took Gardipee in a police car to a place on U.S. Highway No. 2 about one mile west of Harlem, Montana, where Gardipee requested permission to leave the police car. The amended complaint alleges that Martinez stopped the car and, after Gardipee got out, shot him in the left leg. The respondent state district court later noted that these alleged acts occurred "outside the exterior boundaries of the Fort Belknap Indian Reservation" (Pet. App. 2a).[2]

In his amended complaint Gardipee sought $80,000 from petitioner as general and special damages on separate

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[1]The petition sets out the foregoing statutes (Pet. 2-3) as well as the 1937 corporate charter (Pet. App. 5a-13a). Both the 1937 charter and the 1935 constitution are briefly discussed in *Colliflower* v. *Garland*, 342 F. 2d 369, 373 (C.A. 9).

[2]In this Court petitioner states (Pet. 7) that Police Chief Martinez arrested Gardipee and claims that Martinez was transporting Gardipee to Blaine County jail in Chinook, Montana, pursuant to "a working agreement" under which Blaine County received and incarcerated persons arrested by petitioner's police officers.

claims for assault and battery and for negligence arising out of Martinez' alleged conduct. Martinez was not named as a defendant.

Petitioner moved to dismiss Gardipee's action on the ground that it was immune from state-court suits unless that immunity was expressly waived. On February 24, 1976, the respondent state district court (Pet. App. 2a), through the respondent state judge, denied the motion, noting that the alleged conduct occurred off the reservation, and that petitioner, in Section 5(i) of its 1937 corporate charter (Pet. App. 9a), "has waived" whatever immunity it might have. Gardipee's action remains pending in the respondent state court.

On May 11, 1976, petitioner commenced a separate, original action (No. 13374) in the Supreme Court of Montana against the respondent state district court and judge, in which petitioner sought a writ of supervisory control or other appropriate writ ordering the respondents to dismiss Gardipee's tort action for lack of jurisdiction. On May 18, 1976, the Supreme Court of Montana, after "hearing the matter ex parte," denied the requested relief stating that "there are relevant factual disputes that cannot be resolved by this Court and thus supervisory control is not proper" (Br. Opp. App. 11a;[3] Pet. 7-8). The denial was "without prejudice," and petitioner commenced a second proceeding (No. 13443) in the Supreme Court of Montana on July 8, 1976, seeking the same relief (Pet. 8). On October 7, 1976, the Supreme Court of Montana, after having heard counsel "in ex parte presentation"

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[3]The respondents' typewritten brief in opposition to the petition for certiorari contains an appendix lacking numbered pages. We have treated the page immediately following numbered page 6 of the brief in opposition as page 1a with consecutive numbering thereafter.

(Pet. App. 1a), again denied the requested relief without explanation. *State ex rel. Fort Belknap, etc.* v. *Dist. Court, etc.*, 554 P.2d 1115 (Mont. Sup. Ct.) It is this order of October 7, 1976, which the petitioner seeks to have reviewed by this Court.

Meanwhile, on September 28, 1976, the respondent state district court issued its order entering a default judgment against petitioner (Br. Opp. App. 18a) "for such sum as shall be determined and found as damages in proceedings before this Court and jury to be held on a date to be fixed by this Court."[4] Notice of entry of default (Br. Opp. App. 19a) was issued by the respondent state court on October 19, 1976. On or about November 8, 1976, petitioner tendered its answer (Br. Opp. App. 20a-21a) to the respondent state district court, which consisted of a general denial and a statement that petitioner "makes this answer * * * as a special appearance and only for the purpose of excepting to the jurisdiction of" the respondent state district court. On or about January 12, 1977, petitioner filed in the respondent state district court a motion to set aside the default judgment (Br. Opp. App. 22a-24a).

DISCUSSION

The United States believes the petition for a writ of certiorari should not be granted at this time. The decision of the Supreme Court of Montana (Pet. App. 1a), rendered without opinion, did not expressly or necessarily determine any federal question but simply denied petitioner an extraordinary remedy in an original proceeding before that court.[5] It appears that adequate and independent grounds

[4]Petitioner did not respond to a notice of application for default judgment filed by Gardipee.

[5]By contrast, the Montana Supreme Court did decide questions of federal law in *State ex rel. Adoption of Firecrow* v. *District Court*, 536 P.2d 190, reversed *sub nom. Fisher* v. *District Court*, 424 U.S. 382, and in *State ex rel. Kennerly* v. *District Court*, 154 Mont. 488, 466 P.2d 85, reversed *sub nom. Kennerly* v. *District Court of Montana*, 400 U.S. 423.

exist in state procedural law for denying petitioner such extraordinary relief. *State ex rel. Kosena* v. *District Court, etc.*, 560 P.2d 522 (Mont. Sup. Ct.). Because this Court has power to correct only those state-court judgments which "incorrectly adjudge federal rights" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126;[6] see also *Hammerstein* v. *Superior Court*, 341 U.S. 491; compare *Richardson* v. *Ramirez*, 418 U.S. 24, 40-42 n. 13, 59-63, and *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 233-234, 242-247), further review is precluded at this time.

Under Montana law the Montana Supreme Court retains full discretion over whether to grant or deny a writ of supervisory control.[7] Mont. Const., Art. VII, sec. 2(1), (2) (Cum. Supp. 1975); Rule 17, Mont. R. App. Civ. P. "[The writ] is available only in original proceedings * * *, and although it may issue in a broad range of circumstances, it is not equivalent to an appeal." *Fisher* v. *District Court*, 424 U.S. 382, 385 n. 7, reversing *State ex rel. Adoption of Firecrow* v. *District Court*, 536 P.2d 190 (Mont. Sup. Ct.). The Montana Supreme Court has recently stated that summary relief

[6]In *Herb* v. *Pitcairn, supra*, the Court stated (324 U.S. at 126):

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

[7]Rule 17(a), Mont. R. App. Civ. P., states in part:

> The institution of such original proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper.

requires "extraordinary and compelling circumstances beyond simply requiring a party to proceed to trial." *State ex rel. Kosena* v. *District Court, etc., supra,* 560 P.2d at 422.

The order of the Montana Supreme Court does not specify the basis for its refusal to issue the writ. While it may have believed that the district court had correctly rejected petitioner's sovereign immunity defense, it may simply have found "no extraordinary and compelling circumstances" to justify accelerating the normal appellate review.[8] The court may also have believed that the sovereign immunity question could better be decided on a fuller factual record, showing, for example, whether the petitioner employed Martinez as part of its corporate functions under the 1937 charter or as part of its governmental functions under the 1935 tribal constitution.[9] "Where the highest court of the state renders no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment" (*Stembridge* v. *Georgia,* 343 U.S. 541, 547 (emphasis in original)).

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[8]An appeal of any future judgment in the respondent state district court can be taken to the Supreme Court of Montana. Rules 1, 4-5, Mont. R. App. Civ. P. That appeal will provide an opportunity to correct any erroneous assertion of state-court jurisdiction over Indians or Indian organizations. *Crow Tribe of Indians* v. *Deernose,* 158 Mont. 25, 487 P.2d 1133; cf. *Hammerstein* v. *Superior Court, supra,* 341 U.S. at 492-493.

[9]While contending that the 1937 corporate charter does not terminate the Tribe's immunity from suit in all instances, petitioner suggests (Pet. 12-15) that it may be sued in connection with its corporate activities. See also *Separability of Tribal Organizations,* 65 I.D. 483. The United States agrees with petitioner that adoption of a corporate charter is not a general waiver of sovereign immunity and believes that the issue may be of sufficient general importance to warrant this Court's attention on a suitable record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.